UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. SMALL BUSINESS CAPITAL CORP.; MARK FEATHERS; INVESTORS PRIME FUND, LLC; and SBC PORTFOLIO FUND, LLC, Defendants.	Case No.: 5:12-CV-03237-EJD **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF AND MONETARY REMEDIES** **[Re: Docket Item No. 602]**

In this civil enforcement action brought under several federal securities laws, presently before the Court is Plaintiff Securities and Exchange Commission's ("SEC" or "Plaintiff") Motion for Injunctive Relief and Monetary Remedies against Defendant Mark Feathers ("Feathers" or "Defendant") for violations of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). Plaintiff requests a three-pronged remedy, which includes a permanent injunction against violations of specific provisions of federal securities law, disgorgement of a total amount of $7,782,961.07, and a civil penalty in the amount of $300,000.

The Court, having entered Summary judgment against Defendant Feathers on August

16, 2013, and having fully reviewed and considered the SEC's Motion, along with all other pleadings and exhibits submitted by the parties, and heard oral arguments presented by both parties at the hearing on October 22, 2013, and good cause appearing, orders that the SEC's Motion for Injunctive Relief and Monetary Remedies against Defendant Mark Feathers is GRANTED in part and DENIED in part.

I. Permanent Injunction

In the hearing, the SEC presented its arguments in support of the permanent injunction against Defendant from future violations of Section 17(a) of the Securities Act, 15. U.S.C. §77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b), and Rule 10-b thereunder, 17 C.F.R. §240.10b-5, and Section 15(a)(1) of the Exchange Act, 15 U.S.C. §78o(a)(1). The Securities Act and Exchange Act provide for injunctive relief upon a proper showing that there is a reasonable likelihood of future violations of the securities law. In its argument supporting an injunction, the SEC included the factors articulated by the Ninth Circuit Court of Appeals in SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980), which the Court can use to assess the likelihood of future violations. In Murphy, the Ninth Circuit noted that the existence of past violations may give rise to an inference that there will be future violations, but the Court must assess the totality of the circumstances surrounding the defendant and his violations to predict the likelihood of future violations, which include factors such as: (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; and (5) the sincerity of his assurances against future violations. Id. at 655.

During the hearing, the Court provided Defendant Feathers with the opportunity to respond to the Murphy elements presented by the SEC. Defendant Feathers addressed only the two last factors listed above. Feathers expressed to the Court that in his career he has always followed the rules, and will continue to do so in the future. Feathers further presented to the Court that he is currently employed at a printing company.

The Court weighed all the factors and found that Feathers did not meet his burden to rebut the SEC's presentation. In the Order previously issued by this Court, the Court found that Feathers violated the antitrust provisions of the federal securities laws in the past. The Court further found that the SEC produced substantial evidence of Feathers' scienter and there were multiple instances of misrepresentation, thus satisfying the first two factors. There is no evidence presented in the pleadings or in the hearing that Feathers recognizes the wrongful nature of his conduct, thus meeting the third factor. As to the fourth factor, Feathers did not show that he would not re-enter the brokerage industry if he were able, and in his Response indicated that in the future he would hire a securities attorney so as not to violate securities law. For the fifth factor, while not recognizing his past wrongs, Feathers claims that as he has done in the past, he will continue to follow rules in the future. As a result of the Court's careful balancing of the Murphy factors and the conclusion that the SEC has met its burden to predict the likelihood of a future violation, the injunction should issue.

IT IS HEREBY ORDERED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS HEREBY FURTHER ORDERED that Defendant and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED that Defendant, and his officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those persons in active concert or participation with them, who receive actual notice of this Final Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from violating Section 15(a) of the Exchange Act, 15 U.S.C § 78o(a), by making use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security, without being registered as a broker or dealer in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

II. Disgorgement of Ill-Gotten Gains

The SEC requests that the Court order Feathers to disgorge ill-gotten gains of $7,497,402.51, which is the total amount of cash that Feathers caused the funds to transfer to his company, SBCC, plus prejudgment interest from the date of the Receivership, totaling $285,558.56, for a total disgorgement amount of $7,782,961.07. These transfers were used to pay SBCC expenses and manage the yield of the fund, which allowed the funds to give the misleading appearance that they were generating a net income sufficient to pay the target yield returns, and

was both contrary to the representations in the offering documents and not disclosed to investors. The Court found that these misrepresentations were material.

"[A] district court has broad equity powers to order the disgorgement of ill-gotten gains obtained through the violation of the securities laws. Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." SEC v. Platforms Wireless, 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998)). To establish an appropriate disgorgement amount, the SEC need only show a "reasonable approximation" of profits or investor losses causally connected to the violations. Id. Then, the burden shifts to defendant to demonstrate that the figure is not reasonable. Id. The Court finds that the amount of $7,497,402.51 is proper, as it is directly related to the misrepresentations, the misrepresentations associated with it were material, and Feathers has not demonstrated that the figure is unreasonable.

The court has noted, "[t]he ill-gotten gains include prejudgment interest to ensure that the wrongdoer does not profit from the illegal activity." SEC v. Cross Fin. Services, Inc., 908 F. Supp. 718, 734 (C.D. Cal. 1995). The decision regarding whether to grant prejudgment interest is subject to the court's broad discretion, taking into account the need to compensate the wronged parties for actual damages, considerations of fairness and the relative equities of the award, the remedial purposes of the statute involved, and such other principles the Court finds relevant. SEC v. Olins, 762 F. Supp. 2d 1193, 1198 (N.D. Cal. 2011). Here, the Court determines that it is appropriate to order Feathers to pay prejudgment interest, calculated pursuant to 26 U.S.C. §6621, on the cash that he transferred from the Funds to pay SBCC's expenses and target yield returns.

IT IS HEREBY FURTHER ORDERED that Defendant is liable for disgorgement of $7,497,402.51, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $285,558.56, for a total of $7,782,961.07. Defendant shall satisfy this obligation by paying $7,782,961.07 to the SEC within 90 days after entry of this Final Judgment.[1]

[1] Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from

III. Civil Penalty

Sections 20(d) of the Securities Act and 21(d)(3)(A) of the Exchange Act provide the district court with authority to impose civil penalties for violations of the Acts. There are three tiers of penalties possible and the amount of the penalty is to be determined by the court. SEC v. Olins, 762 F. Supp. 2d at 1199. While the Court may order a "first-tier" penalty "in light of the facts and circumstances" of the case, a higher, "second-tier," penalty is only warranted for a violation "involv[ing] fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and a "third-tier" penalty is only warranted where there is a further showing that "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." Id. (quoting 15 U.S.C. § 77t(d)). To assess the appropriate amount of civil penalty, courts look to the Murphy factors. See SEC v. Abacus Intern. Holding Corp., No. C 99-02191, 2001 WL 940913, *5 (N.D. Cal. August 16, 2001).

Here, the SEC requests the Court impose as a "third-tier" civil penalty in the amount of $150,000 for each fund, totaling $300,000. For the reasons articulated earlier in regards to the Murphy factors, the Court finds it appropriate to order a "second-tier" civil penalty, because the

---

a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Mark Feathers as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 90 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

violation involved misrepresentation, and in its discretion orders a civil penalty in the amount of $10,000 against Defendant.

IT IS FURTHER ORDERED that Defendant shall pay a civil penalty in the amount of $10,000 to the SEC pursuant to Section 20(d) of the Securities Act, 15 U.S.C. §77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). Defendant shall make this payment within 90 days after entry of this Final Judgment.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this action for the purpose of implementing and carrying out the terms of all orders and decrees which may be entered herein and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

IT IS SO ORDERED

Dated: Nov. 6, 2013

EDWARD J. DAVILA
United States District Judge